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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN RICHARD BYRD,

Defendant and Appellant.

F067314

(Super. Ct. No. F12901596)

OPINION

APPEAL from judgment of the Superior Court of Fresno County. Jane Cardoza, Judge.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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Kevin Richard Byrd appeals from a judgment entered after a jury found him guilty of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)).¹ In a bifurcated proceeding, the trial court found true the allegation that Byrd had served two prior prison terms (§ 667.5, subd. (b)). Byrd contends that his conviction must be reversed because the field identification procedure was impermissibly suggestive. He also contends the trial court erred when it denied his request for substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We disagree and affirm.

STATEMENT OF THE FACTS

On March 4, 2012, at approximately 1:25 a.m., Benjamin Vang and Yeng Lee were working as armed security guards for a funeral home in Fresno. Vang, Lee and Johnny Hang, another employee, heard a gunshot and looked across the street, where they saw several individuals standing in the parking lot of a closed Radio Shack. Vang saw one man, whom he identified in an in-field showup² and at trial as Byrd, standing behind a silver, four-door Lexus holding what appeared to be a semiautomatic firearm in his right hand. Vang estimated that he was approximately 100 feet from Byrd at the time. The parking lot lighting was sufficient to see Byrd's face. Before running away to call 911, Vang saw Byrd, who was wearing a striped "green-ish and a blue-ish and white-ish" shirt, lower the firearm to his right side.

Hang also saw a man, whom he identified in an in-field showup and at trial as Byrd, standing on the driver's side of the vehicle and pointing a firearm toward the ground. He also described Byrd as wearing a "blue-ish green" shirt. He assumed Byrd

¹ All further statutory references are to the Penal Code unless otherwise stated. Byrd was acquitted of discharging a firearm with gross negligence (§ 246.3, subd. (a)).

² "An in-the-field showup ... is generally an informal confrontation involving only the police, the victim and the suspect." (*People v. Dampier* (1984) 159 Cal.App.3d 709, 713.)

was holding a gun based on the size and shape of the object in Byrd's hand. Hang estimated there were 10 to 15 cars in the Radio Shack parking lot, but then acknowledged that that amount was closer to two or three cars, and there were several people in the parking lot.

After Lee heard the gunshot, he looked over at the parking lot and saw a bald, black adult male holding a gun in his raised right hand. Lee described the man as wearing a "green-ish black-ish" shirt, but was unable to identify him. Approximately 15 minutes after hearing the gunshot, Lee walked to the Radio Shack parking lot and found a spent, .45-caliber shell casing, which he gave to law enforcement.

Police Officer David Wilkin responded to the 911 call with his partner, Officer Jordan Beckford. The two arrived at the scene at approximately 1:30 a.m. and saw a silver Lexus exiting the Radio Shack parking lot. Officer Wilkin activated his overhead lights and siren and followed the vehicle, which did not stop for two and a half blocks and then pulled into a gas station parking lot. When the Lexus stopped, Jovan Rosemond exited the passenger side of the vehicle and attempted to run away, holding his waistband with both hands. Two other officers who arrived at the scene chased and caught Rosemond, who had a .40-caliber firearm on his right hip and a loaded magazine in his pocket. In the meantime, Officer Wilkin detained Byrd, who was driving the vehicle, and searched him and the vehicle for weapons, but did not find any.

Within 30 minutes of the shooting, Vang and Hang came to the gas station where they gave a statement and participated in an in-field showup. Vang and Hang were admonished by the officer that the detained subject may or may not have been involved in shooting a firearm. Vang recognized Byrd by his shirt and bald head and identified him as the person who he saw holding the firearm. Hang recognized Byrd by his shirt and identified him as the person who he saw holding the gun. Neither Vang nor Hang made an identification of Rosemond.

A criminalist found one particle of gunshot residue on Byrd's right hand, but none on Bird's left hand or Rosemond's hands.

DISCUSSION

I. EYEWITNESS IDENTIFICATION

At the outset of trial, the trial court denied Byrd's motion to exclude identification evidence as being unduly suggestive. Byrd now contends his due process rights were violated because eyewitness identifications made at trial were tainted by the earlier identifications made at the impermissibly suggestive in-field showup. We disagree.

We begin with a closer look at the evidence presented at the hearing on the motion to suppress the identification procedure as unduly suggestive.

Evidence at the Hearing

Officer Wilkin testified that he received a dispatch at approximately 1:27 a.m. on March 4, 2012, about a gunshot fired from the Radio Shack parking lot. The suspect was described as a black male wearing a long green shirt, possibly driving a silver Lexus. Officer Wilkin and his partner Officer Beckford arrived at the parking lot about four minutes later and saw a vehicle that matched the description of the suspect's car, which was pulling out of the parking lot. The officers initiated a traffic stop almost immediately and followed the vehicle for approximately three blocks until it pulled into a parking lot at a gas station, where the passenger fled from the car. Byrd, the driver, was searched for weapons, detained and placed in the back of the patrol vehicle.

Officer Wilkin then called Vang and Hang and asked them to come to the gas station to provide a statement. They arrived at the station sometime between 1:45 and 1:50 a.m.

Officer Wilkin first spoke with Vang for approximately 10 minutes before performing the showup. Vang, who observed the suspect at 1:30 a.m. from

approximately 100 yards³ away from the Radio Shack parking lot across the street, described the suspect as approximately six feet tall, medium build, wearing a green and white striped shirt. Officer Wilkin admonished Vang that they had detained someone who may or may not have been the person Vang saw holding the gun, and he asked Vang whether or not he recognized the individual. Vang positively identified Byrd.

Officer Wilkin repeated the same procedure with Hang, who was not within “earshot” when the officer spoke with Vang. Hang told Officer Wilkin he observed the person with the gun from a distance of 100 yards. Hang also positively identified Byrd.

Officer Wilkin did not think Vang or Hang could see Byrd, who was in a police car, while either was being interviewed. Officer Wilkin did not recall whether Byrd was wearing handcuffs at the time of either identification. Both Vang and Hang also observed Rosemond once he was apprehended, but neither identified him as a participant in the incident.

Officer Wilkin explained that he conducted the in-field showup to determine whether law enforcement had apprehended the correct suspect. Specifically, he wanted to exclude the possibility that Byrd was not the person who had earlier discharged the firearm. Had the officers erroneously detained Byrd while the shooter remained at large, there would have been a greater danger to public safety. Officer Beckford testified that he did not witness the showup.

At the conclusion of the evidentiary hearing, the trial court denied the motion, finding that in light of the totality of the circumstances, the procedure used in the case was not unduly prejudicial. The trial court specifically noted that both witnesses were given an appropriate admonition prior to the showup.

³ At trial, Vang testified that he was about 100 feet, not 100 yards, from Byrd when the gunshot occurred. He did not recall telling the officer that he was 100 yards away.

Applicable Law and Analysis

“Defendant bears the burden of showing unfairness as a demonstrative reality, not just speculation.” (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

“In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

“‘If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.’ [Citation.] In other words, ‘[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

“To begin with, ‘[t]he “single person showup” is not inherently unfair.’ [Citation.]” (*People v. Ochoa, supra*, 19 Cal.4th at p. 413.) “Whether an identification procedure is suggestive depends upon the procedure used as well as the circumstances in which the identification takes place. For example, although “[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup has been widely condemned” [citations], sometimes exigent circumstances make such procedures necessary.” (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 38.) “[S]ingle-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness’s mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.] The

law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Citation.]” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387; *People v. Nguyen, supra*, at pp. 38-39 [“Prompt identification of a suspect who has been apprehended close to the time and place of the offense to exonerate the innocent and aid in discovering the guilty is a valid purpose for conducting a one person showup”].) Field identifications allow law enforcement to exclude a detainee as a suspect and continue to “search for the suspect while it is reasonably likely he [or she] is still in the area.” (*People v. Johnson* (1989) 210 Cal.App.3d 316, 323.)

Details that Byrd considers unduly suggestive seem inherent in any showup. Specifically, Byrd argues the identification procedure was unduly suggestive because he was “displayed to witnesses while standing alone next to a police car” However, considering all the circumstances, we conclude that the in-field showup was not unduly suggestive or unnecessary. (*People v. Ochoa, supra*, 19 Cal.4th at p. 412.) Vang and Hang were both given separate neutral admonitions prior to participating in the in-field showup. Officer Wilkin testified that he admonished both Vang and Hang that they had detained someone who may or may not have been the person each had seen holding the gun and asked each whether or not he recognized the individual. Thus, Vang and Hang were told only that an individual had been detained and that the police needed to know whether they could identify him as a suspect. In addition, when police are pursuing fleeing suspects, time is of the essence. It is important that the police establish quickly whether they have detained the correct suspects or must keep looking. The police were not required to wait and place Byrd or his photo in a later lineup.

In light of our conclusion that the in-field showup was not impermissibly suggestive, we need not consider whether Vang or Hang’s identification of Byrd during the showup and at trial were nevertheless reliable. As stated earlier, “[i]f we find that a

challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.’ [Citation.]” (*People v. Ochoa, supra*, 19 Cal.4th at p. 412.)

Even if we were to find the in-field identification procedure unduly suggestive or unnecessary, it was nevertheless reliable under the totality of the circumstances. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.) Both Vang and Hang had a good opportunity to view the silver Lexus and Byrd in the parking lot across the street before making the in-field identification just minutes later. And when Hang and Vang identified Byrd he was wearing the same shirt each had described at the time of the incident.

We reject Byrd’s claim that Vang and Hang’s in-field identification of him violated his due process rights.

II. *MARSDEN* MOTION

After the trial court denied the motion to suppress identifications, Byrd asked that the trial court replace appointed trial counsel. He now contends the trial court abused its discretion in denying his request because Byrd had completely lost trust in trial counsel, who was unprepared for trial. We disagree.

Hearing on the Motion

Byrd made various specific complaints about trial counsel: that he had failed to subpoena witnesses, namely an identification expert, Rosemond, and police witnesses for the identifications motion; that he incorrectly indicated in the section 995 motion that Byrd had three prison priors, when he had only two; that he erroneously indicated that Byrd was identified in a photo lineup; that he did not give Byrd full access to discovery, particularly gunshot residue evidence and “missing pages” from reports; and that he visited Byrd only once outside of the courtroom despite Byrd’s many written requests for other visits to go over his case.

Trial counsel testified that he did not subpoena police officers for the Byrd’s identifications motion, but that he would never do so because the prosecutor would “need

those officers to prove their case,” and the District Attorney would allow him “to work off his motion.” Trial counsel conferred with his immediate supervisor about the possibility of hiring an identification expert, but his supervisor did not think it necessary “[d]ue to the facts in the case” and the jury instructions which could be given.

Trial counsel explained that Byrd had provided him the names of two witnesses, Tasha Rix and Rosemond. An investigator made two or three attempts to speak with these witnesses, but Rix refused to speak with the investigator and Rosemond did not respond to requests for an interview, despite the fact that messages were left with relatives of his. When trial counsel later spoke with Byrd and suggested a continuance so that they could subpoena Rosemond, Byrd was unwilling to waive time. Instead, Byrd thought that Rosemond was not a significant factor, that the case should just be thrown out, and requested counsel to file a section 995 motion instead.

Trial counsel admitted mistakenly stating Byrd had three rather than two priors in his written motion. He claimed that he turned over case materials, including a transcript of the preliminary hearing, to Byrd, had allowed him to “look at” a “missing” page of Officer Wilkin’s report, and if he had not done so already, would get the gunshot residue report to Byrd that same day. Trial counsel claimed that he discussed the case with Byrd at various court proceedings, but acknowledged he met with Byrd only once outside the courtroom when they went over the preliminary hearing and police reports. Trial counsel discussed the case defenses with Byrd at multiple trial proceedings, but believed Byrd was mainly unhappy because he thought the case should be dismissed. Byrd’s case was not originally assigned to trial counsel. He first appeared for Byrd 10 months after Byrd was arraigned. Thereafter, when trial counsel was not present at various hearings, due to being “in trial or in prelim” on another case, Byrd was represented by one of trial counsel’s colleagues, who were instructed to notify trial counsel of any concerns raised by Byrd during those hearings.

Byrd countered that he had not seen the gunshot residue report, the missing page of another report, and several police officers' reports. According to Byrd, trial counsel's failure to provide these was the reason the two did not have a "trustworthy type relationship."

The trial court denied the motion, noting that the defense investigator had tried two or three times to contact Rosemond, who apparently did not want to cooperate, and trial counsel had consulted his supervisor, an experienced trial lawyer, about the need to hire an identification expert. The trial court found Byrd had not been prejudiced by the clerical error and mistaken claim in trial counsel's motion that Byrd had three prison priors instead of the actual two. The trial court directed trial counsel to provide Byrd with the reports he claimed not to have. The trial court then found that trial counsel had been "effective in representing Mr. Byrd and raising all legal issues that have a legal basis to be raised"

Applicable Law and Analysis

Marsden motions are subject to the following well-established rules. Under *Marsden*, when a defendant in some manner moves to discharge current counsel, the trial court's duty is to inquire as to the reasons for the dissatisfaction and exercise its discretion in deciding whether to replace counsel. (*Marsden, supra*, 2 Cal.3d at p. 124; *People v. Lucky* (1988) 45 Cal.3d 259, 281.) A defendant is entitled to relief if he can show inadequate representation or that the attorney-client relationship is irreparably broken down, such that ineffective representation is likely to result. (*People v. Smith* (1993) 6 Cal.4th 684, 696; *People v. Crandell* (1988) 46 Cal.3d 833, 854, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Byrd insists he was entitled to relief on both grounds.

A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. (*People v. Welch* (1999) 20

Cal.4th 701, 728.) “Tactical disagreements between the defendant and his attorney do not by themselves constitute an ‘irreconcilable conflict.’ ‘When a defendant chooses to be represented by professional counsel, that counsel is “captain of the ship” and can make all but a few fundamental decisions for the defendant.’ [Citation.]” (*Id.* at pp. 728-729.)

“Denials of *Marsden* motions are reviewed under an abuse of discretion standard. [Citation.] Denial ‘is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel. [Citations.]’ [Citation.]” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

On appeal, Byrd’s challenge to the adequacy of trial counsel’s representation focuses on counsel’s limited contact with Byrd as counsel met with Byrd only once outside the courtroom and appeared for Byrd only during three of the seven hearings conducted while he was trial counsel.⁴ Byrd argues this is evidence that trial counsel “did not prepare adequately for trial,” citing trial counsel’s failure to call Rosemond and an eyewitness identification expert as witnesses. But these complaints do not rise to the level of constitutionally inadequate representation, nor do they signal a fundamental breakdown in attorney-client relations. (See *People v. Webster* (1991) 54 Cal.3d 411, 436.)

In general, to support a claim of inadequate representation, a defendant must establish that counsel’s representation falls below an objective standard of reasonableness under prevailing professional norms, and “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) “There are countless

⁴ Byrd was represented by substitute counsel at all hearings where trial counsel was not present. All of these hearings involved requests by the defense for a continuance.

ways to provide effective assistance in any given case.” (*Ibid.*) “[A] defendant does not have the right to the appointment of new counsel absent a clear showing of inadequate representation.” (*People v. Silva* (1988) 45 Cal.3d 604, 622.) Byrd did not make such a showing. His description of additional investigation that could have been done does not establish that the preparation conducted by trial counsel and his investigators was constitutionally inadequate, especially in light of trial counsel’s explanation as to why he did not call Rosemond or an expert on eyewitness identification, the discovery he provided Byrd and the aspects of the case he discussed with him. “To the extent there was a credibility question between defendant and counsel at the hearing, the court was ‘entitled to accept counsel’s explanation.’” (*People v. Smith, supra*, 6 Cal.4th at p. 696.)

We find no abuse of discretion on the part of the trial court in denying Byrd’s *Marsden* motion.

DISPOSITION

The judgment is affirmed.

FRANSON, J.

WE CONCUR:

HILL, P.J.

GOMES, J.